

**MINUTES OF MEETING OF THE CORPORATIONS COMMITTEE**  
**December 3, 2004**

A regular meeting of the Corporations Committee (the “Committee”) of the Business Law Section of the State Bar of California was held via video conference from conference rooms located at Sullivan & Cromwell’s offices in Palo Alto and Los Angeles on December 3, 2004. Attendance was as follows:

**MEMBERS PRESENT:**

Curt C. Barwick\*  
Christopher A. Delfino  
Bruce R. Deming  
James F. Fotenos  
Mark T. Hiraide  
Victor Hsu  
Brian A. Lebrecht  
Brian D. McAllister\*  
Stewart Laughlin McDowell  
William R. Sawyers  
David M. Serepca  
Lemoine Skinner III  
Teri Shugart  
Jennifer Lynn Sostrin  
Steven B. Stokdyk  
Suzanne L. Weakley  
Bertha Cortes Willner  
Brian M. Wong  
Russell J. Wood

**MEMBERS ABSENT:**

Matthew R. Gemello  
Steven K. Hazen  
Nina L. Hong  
Lee Kolodny  
Deborah J. Ruosch

**LIAISONS AND GUESTS PRESENT:**

Keith Paul Bishop, Executive Committee  
Betsy Bogart, Secretary of State\*  
Timothy L. Le Bas, Department of Corporations

\*Via telephone.

The minutes summarize discussions primarily in the order items were listed on the Agenda for the meeting previously circulated to members of the Committee, which is not necessarily the order in which the items were actually taken up at the meeting. The Committee did not take up those topics listed on the Agenda that are not described in these minutes.

## **I. ADMINISTRATIVE MATTERS**

1. Opening Remarks and Announcements. The meeting was called to order by Co-Chairs Fotenos and McAllister at 9:30 a.m. Mr. Fotenos thanked the members of the committee for their attendance and informed them that a quorum was present. Mr. Fotenos wished Mr. McAllister a speedy recovery from his back injury and gave thanks to Mr. Stokdyk, his firm, and their office manager, Annette Ross, for coordinating a successful video conference.

2. Introductions. At the request of Mr. Fotenos, each of the members and liaisons introduced themselves.

3. Approval of Minutes. Mr. Fotenos requested the committee to approve the minutes from the meeting of November 5, 2004, as prepared by Co-Secretary Barwick, with minor modifications. Upon motion duly made and duly seconded, the minutes as so modified were unanimously approved.

4. Members' Website (Internet Access). Mr. Fotenos gave thanks and kudos to Mr. Hsu, his firm, and their extranet project manager, Jeffrey Buckner, for their successful implementation of the Committee's extranet for meeting materials. Mr. Fotenos then introduced Mr. Hsu, who took questions and comments concerning the first version of the extranet from those in attendance, including a request to remove a certain hyperlink.

## **II. AGENCY AND LIAISONS' REPORTS**

1. Securities and Exchange Commission. Mr. Fotenos noted Rosalind Tyson's absence from the meeting. Mr. Fotenos then encouraged the members to become familiar with the provision of SEC Release No. 33-8501 (Securities Offering Reform), generally regarding facilitation of communications between issuers and the public and loosening of "gun jumping" rules. Mr. Fotenos recommended that the members review meeting notes of the Securities Registrations Subcommittee of the ABA Committee on Federal Regulation of Securities, which he directed to be posted on the committee's extranet after conclusion of the meeting. Mr. Fotenos requested members to pay particular attention to the proposed streamline registration process for "well known seasoned issuers," and noted that comments are due within 75 days after publication in the Federal Register.

2. Department of Corporations. Mr. Fotenos informed the members present that he had requested Mr. Le Bas (who was not yet in attendance) to discuss the department's news release and request for information concerning DOC's examination of the California Corporate Disclosure Act (Corps. Code Sections 1502, 1502.1, 2117, and 2117.1). Mr. Fotenos described the RFI and informed the committee that comments were due by January 14, 2005. Mr. Fotenos asked Mr. Stokdyk and the Legislative Subcommittee to organize the committee's comments.

Mr. Fotenos then reviewed the committee's prior position supporting conformance of the Act to SEC reporting requirements.

Mr. Sawyers recommended that the committee consider supporting repeal of the Act in its entirety. The members then discussed the pros and cons of the two positions, including the members' sentiments concerning various substantive provisions of the Act, the burdensome provisions of the Act, and the historic role of the Secretary of State within the framework of corporate disclosure regulation generally. The members present supported seeking repeal of the Act.

Mr. Serepca suggested that the committee consider a political middle ground of recommending that California compliance be accomplished by SEC compliance. The members discussed the suggestion.

Mr. Fotenos next suggested estimating in the committee's comment letter the cost of compliance with the Act, based on hourly rates, estimates of time necessary to complete the required filings, and the number of annual filings that are made. The members present discussed the pros and cons of asking their firm members to provide estimates of compliance cost data. The members present supported asking their firm members to provide estimates and including a summary of the resulting data in the committee's comment letter to DOC.

Mr. Bishop reviewed the State of Nevada's approach in referring investors to EDGAR filings and recommend that the committee in its comment letter also emphasize that the Act is bad for investors, since it provides less information than would be provided by a referral to EDGAR filings, as is done in Nevada.

Mr. Le Bas joined the meeting and reported on the RFI and press release. Mr. Le Bas informed the committee that DOC was looking for any and all burdens to help DOC study the efficacy of the Act, at the direct request of Governor Schwarzenegger, which is rare. Mr. Le Bas provided the members present with a brief history of reporting requirements under the Securities Exchange Act of 1934 and related SEC regulations, described the business groups and other state agencies that were being solicited for comment. Mr. Le Bas then reviewed the mechanics for participation, and requested formal comment from the committee.

Mr. Le Bas next informed the members present that he was studying the Uniform Securities Act, and that he plans to meet with Joel Seligman on January 7, 2005, who has committed to assisting in DOC's study of the grey areas of the USA. At the request of Mr. Fotenos, Mr. Le Bas informed the members present that DOC will be looking for comment before April of 2005. Mr. Fotenos then requested the USA Subcommittee to commence work to prepare to assist with the committee's analysis.

Mr. Le Bas further informed the members present that he is working on a number of other initiatives, including a review of California's limited public offering exemption (Cal. Corp. Code Section 25102(n)) with the National Association of Securities

Administrators Small Offering Project Group, a study of shareholders' rights and corporate accountability and uniform standards concerning shareholder approvals of executive compensation in light of NYSE and NASDAQ rules, and others.

Mr. Stokdyk requested that one of the members present co-author the committee's comment letter on the Corporate Disclosure Act and Mr. Wong volunteered.

Mr. Fotenos reviewed with the members present the legislative proposal process flow within the Business Law Section and the State Bar. At the request of Mr. Sawyers, Mr. Fotenos discussed emergency comment procedures.

3. Secretary of State. Ms. Bogart reported that it was the busiest time of the year for the Secretary of State and that workloads and backlogs were increasing. Ms. Bogart reported that the corporate disclosure database was on schedule to be up and running on the agency's website by month-end, and that it will enable basic searches of disclosure statements, which is the first step toward implementation of the agency's Business Programs Automation Project in the Business Entities Division. Ms. Bogart reported that users will not initially be able to access the actual statements, but rather will be able to request copies using the usual ordering procedure, and that it is currently anticipated that users will be able to order copies from their browsers sometime during 2005.

In response to an inquiry by Mr. Fotenos, Ms. Bogart confirmed that the introductory paragraph of AB1000 (cleanup bill to AB55 and new Corporations Code Section 2117.1) does not include a reference to all qualified foreign corporations, creating an implication that perhaps all foreign corporations are covered, whether qualified or not. Ms. Bogart committed to reviewing a confirming letter proposed to be drafted by Mr. Fotenos following the meeting. Ms. Bogart further confirmed that there is no transition period for AB1000, being an enactment of emergency legislation, and that effective September, 2004, all applicable corporate disclosure statements by covered corporations would be due 150 days after fiscal year end. Ms. Bogart answered further questions concerning the operation of the filing deadline.

4. BLS Committee Liaison Reports.

- Corporate Law Departments: At the request of Mr. Fotenos, Mr. Sawyers reported to the members present that he was in touch with Barry Tobias, co-chair, and had requested their agenda and meeting materials. Mr. Barwick and Mr. Lebrecht each raised the issue of whether the Corporate Law Departments Committee was not active on account of their constituents' primary interest in the American Corporate Counsel Association (ACCA). The members present discussed the pros and cons of seeking an interface between the committee and ACCA. The members present further discussed seeking an interface with the American Association of Corporate Secretaries. Mr. Fotenos suggested that the committee might consider providing those organizations with a draft of the committee's comment letter on the Corporate Disclosure Act. Mr. Sawyers undertook to report back to the committee after further investigation.

- Cyberspace Law: At the request of Mr. Fotenos, Mr. Serepca reported to the members present that he had attended a meeting of the Cyberspace Law Committee held on December 2, 2004, in Menlo Park. Mr. Serepca provided the members present with an overview of the meeting, a potential portion of the agenda of the Cyberspace Law Committee concerning record keeping (The Sedona Guidelines) that might be of interest to the committee, and the appointment of Robert V. Hale II as liaison from the Cyberspace Law Committee to the committee.

- Non-Profit Corporations: At the request of Mr. Fotenos, Mr. Delfino reported to the members present that he had made contact with a chair of the Non-Profit Corporations Committee and would report back to the committee after further dialogue. Mr. Le Bas requested Mr. Delfino to ask the Non-Profit Corporations Committee for comments in response to the DOC RFI concerning the Corporate Disclosure Act previously discussed.

- Partnerships and LLCs: At the request of Mr. Fotenos, Mr. Demming reported to the members present that he had exchanged contact information and was starting a dialogue with the Partnerships and LLCs Committee. Mr. Demming committed to report back to the committee after further dialogue.

### **III. 2004-2005 AGENDA - STATUS**

1. Opinion Report: Mr. Fotenos reviewed the status of the committee's Opinion Report and the Opinions Committee's review of the same. Mr. Fotenos next reviewed with the members present the points contained in his Memorandum dated November 24, 2004, regarding Version 9.5 of the Opinion Report, a copy of which was provided in the meeting materials, asking for comments by the members present on each of the points raised. Mr. Fotenos also described a comment that he had received from Steven Weiss concerning Mr. Weiss' suggestion that the committee consider removing the discussion of liability found at Part III, Section B, of the draft report. Mr. Fotenos recommended leaving the standard of care, misleading opinions, ethical issues and in-house lawyers discussions, and making the deleted portion the subject of a BLN article. The members present discussed Mr. Weiss' comments and Mr. Fotenos' compromise. Mr. Sawyers then made a motion to approve the revised report with Mr. Fotenos' compromise, however Mr. Fotenos asked that a vote be deferred until the Opinions Committee had signed off on the report, and expressed that he anticipated the vote to occur either at the next meeting of the committee or by cyber-vote.

Mr. Fotenos addressed the issue of whether other bar associations might be asked to comment on the draft report. The members present discussed the issue. Mr. Fotenos reported that comments by other bar associations would not delay posting of the draft report on the committee's website, which would happen after the Opinions Committee and the committee have approved the report.

The members present further discussed the consequences of removing Part III Section B. Upon motion duly made and seconded, removal of Part III, Section B, from the draft opinion report as proposed by Mr. Fotenos was then unanimously approved.

2. Guide to Organizing a California Corporation: At the request of Mr. Fotenos, Ms. Shugart reported to the members present that a final editing subcommittee had been formed and was meeting after the next committee meeting on January 7, 2005, consisting of Mr. Kolodny, Ms. Hong, Ms. Sostrin, Mr. Wong, Ms. Weakley and herself. Ms. Shugart reported to the members present that she anticipates to circulate to the committee a proposed final draft following the subcommittee meeting.

3. Section 307(b) Amendment: Mr. Wong reported to the members present that he believes that the Board of Governors is voting on the proposed amendment to Section 307(b).

4. Section 710 Amendment: Mr. Fotenos reviewed current Section 710 limitations on supermajority voting and its “sunset” provisions. Mr. Fotenos then reviewed with the members present a draft memorandum concerning a proposed amendment to Section 710, proposed to be presented to the Executive Committee for issuance to the State Bar’s Office of Governmental Affairs, a copy of which was provided in the meeting materials.

Mr. Fotenos asked Mr. Bishop to review with the members present some further possible proposals for revisions to the Corporations Code. Mr. Bishop proposed that the committee consider advocating for changes in the following areas: (1) cleanup provision that refers to a non-existent provision of the Revenue and Tax Code; (2) amendment to the definition of “transact intrastate business” to exclude specifically foreign corporate managers of LLCs that are qualified to do business in California, as is currently provided for foreign LLC managers under Section 17001(ap); and (3) adoption of a new exchange reorganization procedure for California, similar to current enactments in New York, Nevada, Pennsylvania and Maryland, which treat certain exchange reorganizations like mergers in certain respects. The members present discussed Mr. Bishop’s proposals and Mr. Bishop answered questions concerning how the proposed changes might operate. Mr. Fotenos committed to providing the relevant New York statutes in the meeting materials for the next meeting of the committee on January 7, 2005.

5. Uniform Securities Act Adoption: Mr. Fotenos requested Mr. Hiraide to chair the USA Subcommittee and to coordinate the committee’s understanding of DOC’s proposal between now and April of 2005.

6. Close Corporation Model Act Improvements: Mr. Fotenos informed the members present that he would soon be sending Mr. Serepca the model act provisions for initial review.

7. BLN Article re SOX (Sarbanes Oxley) and State Law Conflicts: At the request of Mr. Fotenos, Mr. Wood reported to the members present that he is working on

an outline of the article for circulation in the next month or so, prior to formation of a subcommittee.

8. BLN Article re SB 1306 (Electronic Communication): Mr. McAllister reported to the members present that he is working on an outline to provide to Ms. Weakley and Mr. Gemello soon. Mr. Fotenos suggested to the members present that the committee's contribution to the BLN annual review might be the article on SB1306. Ms. Weakley then described for the members present the purpose, scope and format of the annual review contribution to the BLN expected from the committee. The members present discussed the scope of the SB1306 article and potential other topics for inclusion in an article for the BLN annual review.

9. Commentary Annotations to National Venture Capital Association Model Forms: At the request of Mr. Fotenos, Mr. Skinner informed the members present that he had spoken with a representative of the NVCA and gotten approval to proceed with the proposed project. Mr. Skinner informed the members present that he was waiting to hear from all members of the subcommittee concerning their proposed contributions.

#### **IV. SUBCOMMITTEE REPORTS**

1. Legislation: At the request of Mr. Fotenos, Mr. Stokdyk reported to the members present that the subcommittee had been quiet over the past month, principally on account of the fact that the Legislature is not in session. Mr. Le Bas informed the members present, as a point of interest, that the former Senate Banking, Commerce and International Trade Committee has been merged into the expanded Senate Banking, Finance and Insurance Committee. The members present discussed the change.

2. Communications/Website: At the request of Mr. Fotenos, the members present discussed the pros and cons of a potential bulletin board and a potential interactive list-serve.

3. Education/Publications: At the request of Mr. Fotenos, Ms. Weakley informed the members present of that she had received a notice dated November 29, 2004, informing that the deadline for contributions to the BLN annual review is January 31, 2005. Ms. Weakley then generally described contributions made by other committees did last year and highlighted the absence of an annual review article submission from the committee. The members present then discussed topics for inclusion in an annual review article from the committee, and Ms. Weakley proposed a process flow for assembling the article, including obtaining input from Ms. McDowell, Mr. Wong, Mr. Sawyers and Mr. Le Bas.

Ms. Shugart described the division of labor by the subcommittee. Ms. Shugart next reported to the members present that she is presenting a program entitled "Girlie Men and Manly Girls: What Corporate Lawyer Shouldn't Be Saying," on Saturday, January 29, 2005, at 4 p.m., at the upcoming State Bar Section Education Institute in San

Francisco. Ms. Shugart further described her social justice work in gender bias and differences in children, and the members present discussed other gender bias examples.

Mr. Fotenos commended Ms. Weakley on her work in the publication of his presentation at the State Bar Annual Meeting on close corporations by CEB, scheduled to appear in February.

## **V. OTHER PROJECTS**

1. Pepperdine Article: Mr. Fotenos reported to the members present that the article had been published and that reprints would be coming shortly.

## **VI. OTHER BUSINESS**

Mr. Fotenos reported to the members present that he had reviewed an interesting outline by the ABA Section of Business Law entitled “SEC v. Lawyers: When Is It Appropriate?” dated November 19, 2004, by authors that included a former chief of enforcement, which Mr. Fotenos directed to be posted on the committee’s extranet following conclusion of the meeting.

Mr. Fotenos asked the members present if holding Northern California meetings in downtown San Francisco, instead of near the San Francisco International Airport, would be more convenient for committee members attending meetings from Southern California. The members present via video conference in Los Angeles agreed, and Mr. Wong, on behalf of his firm, volunteered the use of conference rooms for the meetings of the committee, as well as the Guide to Organizing a California Corporation Editing Subcommittee, to be held on January 7, 2005.

The meeting was adjourned at approximately 12 p.m.

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David M. Serepca, Co-Secretary